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FILED
JUN 11 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 06-1350

IN THE

Supreme Court of the United States

BRUCE OSBORNE,

Petitioner,

v.

HARTFORD LIFE AND ACCIDENT INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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June 11, 2007

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QUESTION PRESENTED FOR REVIEW

Whether the Sixth Circuit properly concluded that a plan administrator with discretion to determine benefits eligibility and to construe the terms of an ERISA-governed plan did not act arbitrarily and capriciously in terminating Petitioner's disability benefits.

RULE 29.6 STATEMENT

The parent corporation for Respondent Harford Life and Accident Insurance Company ("Hartford") is The Hartford Financial Services Group, Inc., which is a publicly-held company and owns 10% or more of Harford's capital stock.

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RESPONDENT'S BRIEF IN OPPOSITION

In the decision below, the Sixth Circuit applied well-settled legal principles to a unique set of facts. Its decision raises no issues worthy of this Court's review, and Petitioner's claims to the contrary are mistaken. The petition should therefore be denied.

1. Petitioner was employed as the President of Insurex Benefits Administration and Insurex Agency, Inc. ("Insurex") and was covered under his employer's group ERISA plan (the "Policy"). (CAJA 181-82) The Policy was obtained by Insurex's parent company TPI Restaurants, Inc. from Hartford Life and Accident Insurance Company ("Hartford"), which is both the administrator and issuer of the Policy. (CAJA 581-627) The Policy provided coverage if Petitioner was rendered "Totally Disabled," which is defined as "prevented by Disability from doing all the material and substantial duties of your own occupation on a full time basis." (CAJA 537-38) In May of 1996, Petitioner resigned as President of Insurex and applied for disability benefits under the Policy after suffering a heart attack and being diagnosed with congestive heart failure. (CAJA 77, 559-66)

In August of 1996, Hartford began paying long-term disability benefits to Petitioner. (CAJA 539) Hartford concluded that Petitioner qualified for long-term disability because he met the Policy's definition of "Totally Disabled." (CAJA 537-38) Specifically, Hartford concluded that Petitioner was disabled from his position as "A President" because that position would "encompass a great deal of stress," which he could not handle in his condition at that time. (CAJA 550, 552) Hartford notified Petitioner that he would continue receiving benefits "as long as [he] meet[s] the policy definition of total disability as it pertains to [his] claim." (CAJA 537)

In 2001, following a preliminary and then more detailed periodic review, Hartford concluded that Petitioner was no longer "Totally Disabled" under the terms of the Policy and terminated his benefit payments. (CAJA 81-85) The investigation produced video of Petitioner "display[ing] a good range of motion with no apparent signs of discomfort or physical limitation." (CAJA 84, 156, 225, 628) Petitioner was also observed spending a considerable amount of time at Colonial Country Club playing golf and cards. (CAJA 84, 156, 225) Indeed, during an interview with a Hartford investigator, Petitioner said that on a regular basis he arrived at Colonial Country Club at 11:30 in the morning and spent "all day" there. (CAJA 83, 165) He also explained that he played golf and cards while at the country club. (CAJA 83, 165) He estimated that he played 70-80 rounds of golf per year and maintained a handicap of twelve. (CAJA 83, 165)

In notifying Petitioner of its decision to discontinue his benefits, Hartford explained that its decision was "based . . . on policy language and all the documents contained in [Petitioner's] file." (CAJA 81) It further explained that a vocational assessment classified Petitioner's occupation as "Sedentary," which Petitioner was considered able to perform. (CAJA 84) In clarifying the basis of this classification, Hartford explained that it had concluded under the United States Department of Labor's Dictionary of Occupational Titles ("DOT"), that Petitioner's position with Insurex was properly classified as "President, Financial Institution," and that this occupation, as well as the occupation "President, Any Industry," were classifiable as "Sedentary." (CAJA 84, 128) Hartford explained that it had concluded Petitioner could perform the functions of this classification. (CAJA 84, 128)

Petitioner administratively appealed Hartford's decision, in part contesting Hartford's use of "a generic description of a president's job" in the DOT. (CAJA 111, 115) As part of the appeal review process, Hartford engaged Dr. Joseph A. Vita,

an independent cardiology specialist from the University Disability Consortium, to review Petitioner's file and surveillance data, as well as speak with Petitioner's treating physician. (CAJA 92-98, 107-08) Dr. Vita concluded that Petitioner could perform the sedentary work Hartford had determined Petitioner's position entailed. (CAJA 93, 97-98)

After reviewing Dr. Vita's report and the administrative record, Hartford concluded that Petitioner was no longer "Totally Disabled" under the terms of the Policy and reaffirmed its decision to deny Petitioner further benefits. (CAJA 86-88, 89-91) Hartford explained that its decision was based

> on the occupational requirements as the occupation exists in the national economy. Our research reveals that the occupation of "President, Financial Institution" is a sedentary occupation and in fact the occupation of "President, Any Industry" is also classified as Sedentary. Our Policy states specifically that benefits will be paid if one is Totally Disabled from his own occupation. [Petitioner's] occupation is that of a President of a Financial Institution. (CAJA 88, 91)

Hartford went on to note that Dr. Vita found that Petitioner's medical condition "would not prevent him from performing the duties of his own job as they were being performed when he left his position at Insurex." (CAJA 88, 91)

2. Petitioner filed suit in state court challenging Hartford's decision, and Hartford removed the case to the United States District Court for the Western District of Tennessee. Petitioner argued, among other things, that Hartford's interpretation of the term "own occupation" was erroneous. The District Court concluded, however, that the deferential standard of review applicable to Hartford's determination obviated the need for the court to construe that term. Pet. App. 37a. Rather, the District Court held that "the more prudent approach is not to usurp the discretion given to the

plan administrator to interpret the policy." *Id.* On the record as a whole, the District Court concluded that Hartford's determination was reasonable.

On appeal, the Sixth Circuit explained that its review was limited to whether Hartford's actions were arbitrary and capricious. Pet. App. 8a (citing *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 115 (1989)). It noted that the Policy vested full discretion in Hartford to determine eligibility, that it did not dictate how Hartford was to make such determinations, and that the term "occupation" was "sufficiently general and flexible to justify" Hartford's reliance on the DOT to determine Petitioner's occupation. *Id.* at 8a-9a. "Although reasonable persons may disagree over the most appropriate methodology for determining a particular employee's 'occupation,'" the court below concluded, "we cannot say that Hartford transgressed the boundaries of its broad discretion under its insurance policy and the ERISA plan to make disability determinations." *Id.* at 9a. The Sixth Circuit further explained that, in light of the arbitrary and capricious standard of review, "[t]he dispute before [it] is not over the meaning of 'own occupation,' which defines the term 'Total Disability,' but over the methodology Hartford used to determine [Petitioner's] occupation." *Id.* at 10a. That methodology, the Sixth Circuit determined, was "'reasonable.'" *Id.* at 9a.

The Sixth Circuit declined to address Petitioner's argument that he is not the president of a financial institution and that the DOT has a more accurate description Hartford should have used. Pet. App. 11a-12a. The court explained that Petitioner failed to raise the issue before the District Court and only raised it before the Sixth Circuit in his reply brief. The court declined to address this waived argument, noting that Petitioner's "new argument . . . is primarily factual." *Id.* at 12a.

REASONS FOR DENYING THE WRIT

Petitioner seeks review claiming that the decision below conflicts with decisions of other courts on the meaning of "own occupation" or "regular occupation." Alternatively, he claims that the Sixth Circuit's decision departs from other circuits on the issue whether Hartford used a properly comparable definition of his occupation. Both of these claims rest on a fundamental misunderstanding of the nature of arbitrary and capricious review. In addition, Petitioner waived his second ground for review.

1. The legal standards governing judicial review of eligibility determinations are well-settled, and Petitioner does not contend that the Sixth Circuit applied the wrong standard. In *Firestone*, this Court ruled that, where a plan gives the administrator discretion to construe uncertain terms or to determine eligibility for benefits, an administrator's denial of benefits under an ERISA-governed plan is reviewed under an arbitrary and capricious standard. 489 U.S. 101, 115 (1989). On the other hand, trust principles dictate that a court engage in *de novo* review when the administrator is not invested with such discretion. Hartford indisputably had discretion to determine benefit eligibility and to construe the terms of the Policy. Pet. App. 8a; *id.* at 28a (noting Petitioner's concession that the Policy gave Hartford discretion and that the applicable standard was whether Hartford acted arbitrarily and capriciously). Applying the proper arbitrary and capricious standard of review, the Sixth Circuit concluded that it could not "say that Hartford transgressed the boundaries of its broad discretion under its insurance policy and the ERISA plan to make disability determinations." *Id.* at 9a (citing *Gallagher* v. *Reliance Std. Life Ins. Co.*, 305 F.3d 264, 272 (4th Cir. 2002)).

Petitioner's claim that this straightforward ruling creates a conflict over the definition of "occupation" in ERISA plans, Pet. 16-17, fails to recognize the role that the relevant standard of review plays in determining the propriety of

benefit eligibility decisions. Petitioner claims that "uniform construction of terms such as 'regular occupation' and 'own occupation' in ERISA plans is a fundamental component of" ERISA's regulatory regime and that uniformity of interpretation is mandated by "the trust-based fiduciary model this Court has recognized" under ERISA. *Id.* at 16. But as the Sixth Circuit correctly recognized, the very nature of an arbitrary and capricious standard of review is that it allows for *multiple* answers to questions concerning the methodology an administrator may use or the definition it may reach under a plan that confers discretion. *See* Pet. App. 9a (recognizing that "reasonable persons may disagree over the most appropriate methodology for determining a particular employee's 'occupation'"). Under this standard of review, a court does not decide whether the particular choice was the one it would have made; rather, it must only decide whether the choice was permissible.

This Court has repeatedly recognized this fact when applying the essentially identical arbitrary and capricious standard used to review agency interpretations of statutes. *See Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (explaining that the court should not define an ambiguous term, but merely determine whether the agency reached a "permissible construction"). This deferential standard of review even allows for inconsistent interpretations of the same term. *See, e.g.*, *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (noting that contradictory interpretations by an agency does not necessarily render a decision arbitrary and capricious); *see also Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). Under ERISA, therefore, administrators exercising discretion can adopt different interpretations of comparable terms in different plans, and reviewing courts must uphold these differing interpretations as long as they are not arbitrary or capricious. Thus, the trust-based model this Court has adopted—and the highly

deferential standard of review that model can entail—*precludes* the type of uniform construction of ERISA-governed plan terms that Petitioner seeks. *See also Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 833 (2003) ("It is the Secretary of Labor's view that ERISA is best served by 'preserv[ing] the greatest flexibility possible for . . . operating claims processing systems consistent with the prudent administration of a plan." (alternation and omission in original)). Similarly, the existence of circuit decisions upholding different or even inconsistent interpretations of comparable terms in different plans is not evidence of a conflict. Rather, it follows naturally from adherence to the arbitrary and capricious standard of review this Court has mandated.

Petitioner's attempt to manufacture a circuit split out of "non-uniform" results, therefore, is entirely misplaced. Two of the cases he cites—*Gallagher* v. *Reliance Standard Life Insurance Co.*, 305 F.3d 264 (4th Cir. 2002), and *Kinstler* v. *First Reliance Standard Life Insurance Co.*, 181 F.3d 243 (2d Cir. 1999)—did not involve arbitrary and capricious review at all. Rather, in those cases, the courts concluded that the applicable plans did not vest discretionary authority in the administrator, and the courts therefore construed the terms *de novo*. *Gallagher*, 305 F.3d at 269-70; *Kinstler*, 181 F.3d at 252. Even assuming, as Petitioner claims, that the interpretation of "own occupation" that the Sixth Circuit upheld in this case differs from the interpretations that the *Gallagher* and *Kinstler* courts gave to comparable terms in other plans, this difference does not constitute a conflict among the circuits. It simply reflects the fact that the latter courts were employing a different standard of review than the Sixth Circuit used here.

Only two of the cases Petitioner cites actually used the arbitrary and capricious standard. In *Tsoulas* v. *Liberty Life Assurance Co. of Boston*, 454 F.3d 69 (1st Cir. 2006), the First Circuit concluded that the administrator's sole use of the DOT in assessing the claimant's duties did not render its

decision to deny benefits arbitrary and capricious. *Id.* at 78. That result is entirely consistent with the decision below. Indeed, like the Sixth Circuit here, the court looked to the Fourth Circuit's conclusion that the DOT is an appropriate reference when its description "'involve[s] comparable duties but not necessarily every duty.'" *Id.* (quoting *Gallagher*, 305 F.3d at 272); *see also* Pet. App. 9a (quoting same).

In *Lasser* v. *Reliance Standard Life Insurance Co.*, 344 F.3d 381 (3d Cir. 2003), the Third Circuit applied the arbitrary and capricious standard of review, but declined to defer to the administrator's interpretation of "regular occupation" because, the Third Circuit believed, the phrase was not ambiguous and, even if it were, the administrator's interpretation was unreasonable. *Id.* at 385-86. Brushing aside the different language of the two policies, Petitioner argues there is a conflict between *Lasser* and the decision in this case. But any such "conflict" is a conflict in *result* only, not in underlying legal principles. Accordingly, it raises no issues of national importance warranting this Court's review.

As noted above, ERISA does not mandate national uniformity in the construction of terms in benefit plans, and the standards of review *Firestone* establishes foreclose such uniformity. The decision below, therefore, affords the Court no opportunity to address a recurring and important question of federal law. Instead, the Court could decide only that, applying existing standards of review to the language of this plan, the Sixth Circuit either properly or improperly deferred to the administrator's eligibility decision. Because this Court does not sit to correct errors in the routine application of settled law, the "conflict in result" that Petitioner claims does not warrant review by this Court.

2. Alternatively, Petitioner contends that the Sixth Circuit should have reversed the administrator's decision in this case because a different definition in the DOT provides the more accurate description of his occupation. Pet. 17. This fact-bound claim likewise provides no basis for review. Indeed,

the Sixth Circuit itself noted that Petitioner's claim that Hartford should have used a more comparable definition from the DOT is simply a factual dispute.[1]

In all events, the issue is not properly presented. The Sixth Circuit explicitly declined to consider the issue because Petitioner failed to raise it until his reply brief on appeal, and had failed entirely to raise it before the District Court, which, understandably, did not address it. Pet. App. 11a-12a. Accordingly, the issue is not properly presented to this Court. *See California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957) (refusing to recognize a contention that was waived below by petitioner's failure to brief the issue). The issue was waived below and does not present the exceptional circumstance necessary to make an exception to the Court's general rule against considering unaddressed, waived arguments. *See Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam) (explaining the general rule that the Court will not address issues not passed on by the lower courts, refusing to address the merits of the unraised issue, but remanding the case on a constitutional issue to be addressed by the lower courts); *see also City of Springfield, Mass.* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (stating that the Court does not ordinarily decide questions not raised or litigated in the lower courts).

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[1] Petitioner's hyperbolic claim that the Sixth Circuit "allows an ERISA fiduciary to apply a completely arbitrary occupational description," Pet. 17, is manifestly wrong. By definition, the arbitrary and capricious standard of review the Sixth Circuit properly applied in this case would mandate reversal of a fiduciary's "completely arbitrary" choice of occupational definition.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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